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May 17, 1999

*BY HAND DELIVERY*

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

RECEIVED  
MAY 17 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

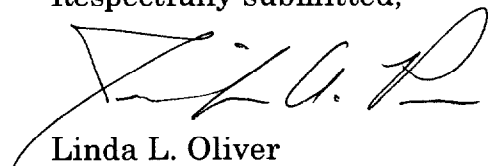
**Re: Petition for Declaratory Ruling Regarding the Use of  
Section 252(i) to Opt into Provisions Containing Non-  
Cost-Based Rates, CC Docket No. 99-143**

Dear Ms. Salas:

Please find enclosed for filing in the above-referenced proceeding, an original and seven copies of the comments of Qwest Communications Corporation on GTE's petition for declaratory ruling. These comments are being filed in response to the request for comments in the public notice dated May 6, 1999 (DA 99-862). Copies of these comments also are being hand-delivered today to Janice M. Myles at the Common Carrier Bureau and to International Transcription Services, Inc.

Please date stamp and return with our messenger the additional copy of these comments. Please give us a call if you have any questions regarding this filing.

Respectfully submitted,

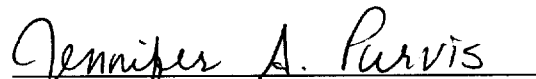
  
Linda L. Oliver  
Jennifer A. Purvis

Enclosure

No. of Copies rec'd 0+7  
List ABCDE

## CERTIFICATE OF SERVICE

I, Jennifer A. Purvis, hereby certify that on this 18th day of May, 1999, I caused to be served the foregoing comments in Docket No. 99-143 on the attached active party list by hand delivery or overnight delivery, where indicated.

  
Jennifer A. Purvis      ANP

### **Active Party List Docket No. 99-143**

Janice M. Myles  
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445 12th Street, SW  
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International Transcription  
Services, Inc.  
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Carol Matthey, Acting Chief  
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Chairman William E. Kennard  
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\* via overnight delivery

Commissioner Harold Furchtgott-Roth  
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**Before the  
FEDERAL COMMUNICATIONS COMMISSION**

Request for Declaratory Ruling	)	
Regarding the Use of Section 252(i)	)	CC Docket No. 99-143
to Opt Into Provisions Containing	)	
Non-Cost-Based Rates	)	

**COMMENTS OF QWEST COMMUNICATIONS CORPORATION**

Qwest Communications Corporation ("Qwest"), by its attorneys, hereby comments on the petition for declaratory ruling filed by GTE Service Corporation ("GTE") in the above-captioned proceeding. The Commission should reject GTE's petition as a transparent attempt to avoid its obligations under the 1996 Act and under state arbitration orders. The Commission should also reject GTE's petition as an improper attempt to make an end-run around this Commission's fact-finding and rulemaking process in the ISP Reciprocal Compensation Proceeding. 1/

**INTRODUCTION**

Qwest is a nationwide, facilities-based multimedia communications company offering a full range of voice, data, video, and information services domestically and internationally. Qwest is nearing the completion of construction of a \$2.5 billion, 18,500 mile, state-of-the-art, high-capacity, advanced fiber optic

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38 (rel. Feb. 26, 1999) ("ISP Reciprocal Compensation Order" and "ISP Reciprocal Compensation NPRM"), pet's for review pending.

telecommunications network across the United States. Qwest is in the process of obtaining facilities-based competitive local exchange carrier (CLEC) certification in all 50 states, and will need to enter into interconnection agreements with incumbent local exchange carriers ("ILECs"), including GTE.

Qwest's ability to opt in to interconnection agreements negotiated by other CLECs is essential in order to speed Qwest's entry into local markets, to save it the unnecessary delay and expense associated with negotiating its own agreements, and to ensure that the ILECs are not discriminating among CLECs by denying access to interconnection agreements. These factors, after all, are what motivated Congress to include Section 252(i) in the Act. 2/ If granted, GTE's petition could undo much of that good.

**I. GTE'S PETITION IS BASED ON A FLAGRANT MISREADING OF THE FCC'S RULES GOVERNING INTERCONNECTION AGREEMENTS.**

GTE's petition asks the Commission to issue a ruling that would allow ILECs to deny competitive carriers the ability to opt into an interconnection agreement under Section 252(i) of the 1996 Act simply by asserting that the rates under the agreement "are no longer cost-based." 3/ GTE bases its argument on a plainly incorrect reading of the Commission's rules -- specifically Rule 51.809.

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2/ 47 U.S.C. § 252(i).

3/ Petition for Declaratory Ruling Regarding the Use of Section 252(i) to Opt into Provisions Containing Non-Cost-Based Rates (filed April 13, 1999), at 1, 2 ("Petition").

Notably, GTE never actually recites the language in the rule. Section 51.809 provides, in pertinent part:

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party . . . upon the same rates, terms, and conditions as those provided in the agreement.

(b) The obligations of paragraph (a) . . . shall not apply where the incumbent LEC *proves* to the *state commission* that:

(1) The costs of *providing* a particular interconnection, service, or element to the requesting telecommunications carrier *are greater than* the costs of providing it to the *telecommunications carrier that originally negotiated the agreement* . . . 4/

A review of the language in Section 51.809 shows that GTE has grossly mischaracterized this rule. GTE asserts that, under Section 51.809, an ILEC may deny a competitive local exchange carrier's ("CLEC's") request to opt into an agreement if the rates charged are no longer cost-based. But Section 51.809 says nothing of the kind, and neither does the FCC's August 1996 Local Competition Order, in which the Commission adopted that rule. 5/

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4/ 47 C.F.R. § 51.809(a) and (b) (emphases added).

5/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 16140 (1996) at ¶ 1317 ("Local Competition Order"), vacated in part sub nom. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part and remanded in part sub nom. AT&T Corp., 119 S.Ct. 721 (1999).

Instead, Section 51.809(a) makes it clear that carriers may opt into any interconnection agreement. The only exception (other than technical infeasibility) is set forth in Section 51.809(b), which permits an ILEC to deny a CLEC's request to opt into an agreement *only if* the ILEC can prove to a state commission that it would cost the ILEC more to provide a service, arrangement, or element to a *subsequent* requesting carrier than it had cost the ILEC to provide the service, arrangement, or element to the *original* negotiating CLEC. Thus, the rule requires a comparison between the ILEC's costs with respect to the requesting -- or *subsequent* -- CLEC and the ILEC's costs with respect to the *original CLEC*.

Section 51.809, therefore, applies to situations in which the ILEC's costs with respect to a second CLEC are different from those it would incur to serve the original CLEC. Section 51.809 does not apply, as GTE would have the Commission believe, to situations in which an ILEC simply believes that it is paying the original carrier more than it should.

The language GTE quotes from the Local Competition Order actually confirms that Section 51.809 focuses not on whether the original rates are cost-based, but rather on whether there is a difference between the ILEC's costs with respect to the original CLEC versus the ILEC's costs with respect to a second CLEC:

We conclude that [Sections 251(c)(2) and 251(c)(3)], read together, require that publicly-filed agreements be made available only to carriers who cause the incumbent LEC to

*incur no greater costs than the carrier who originally negotiated the agreement . . . .* 6/

GTE never even alleges that its costs have changed over time, or that the cost to serve subsequent CLECs is any different than it was to serve the original CLECs that negotiated its interconnection agreements. GTE also does not allege that it has attempted to prove anything to state commissions, as is required by the rule. GTE's reliance on Rule 51.809 is therefore completely unfounded. The Commission should reprimand GTE, in fact, for describing the rule in such a plainly incorrect manner.

**II. GTE'S REAL OBJECTIVE IS TO SHORT-CIRCUIT THE STATE AND FEDERAL PROCEDURES FOR ADDRESSING RECIPROCAL COMPENSATION ISSUES.**

GTE's petition is also founded on vague allegations that the rates for reciprocal compensation set forth in its interconnection agreements are somehow no longer proper after the FCC issued its decision on the jurisdictional nature of calls placed to information service providers (ISPs). 7/ GTE does not suggest that the rates for reciprocal compensation in general are not cost-based. In fact, GTE alleges that the reciprocal compensation rates governing "circuit-switched" calls are cost-based. 8/

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6/ Id., 11 FCC Rcd at 16140, ¶ 1317 (emphasis added).

7/ ISP Reciprocal Compensation Order, supra.

8/ Petition at 7.

GTE also admits that the rates in question were either negotiated or arbitrated by state commissions. Those rates are therefore presumptively lawful. If GTE believes it is paying a CLEC more than it should for services such as switching and reciprocal compensation under a negotiated interconnection agreement or under a state arbitration order, GTE must either re-negotiate the agreement or make its case to the state commission. A petition for declaratory ruling from this Commission is not the appropriate vehicle under the Act for addressing these concerns.

GTE's real grievance appears to be with the pricing of compensation for terminating calls to ISPs. But this question has already been addressed by state commissions in the context of numerous arbitration proceedings. The Commission's ISP order did not disturb those state decisions. <sup>9/</sup> If GTE is suggesting that the FCC's jurisdictional ruling calls into question the treatment of reciprocal compensation for ISP traffic, then its remedy is to file comments in the FCC's further rulemaking, which is intended to answer that very question. In filing this petition, GTE is attempting to do an end run around that rulemaking. <sup>10/</sup>

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<sup>9/</sup> ISP Reciprocal Compensation Order at ¶¶ 25-27. Indeed, many state commissions have already reaffirmed their previous rulings treating ISP traffic the same as other local traffic for reciprocal compensation purposes.

<sup>10/</sup> For example, in its petition, GTE quotes language that comes not from the declaratory ruling part of the ISP Order (as GTE implies), but rather from the further notice portion of that order. See GTE Petition at 5-6, quoting ISP Reciprocal Compensation NPRM at ¶ 29.

The Commission made it clear in the ISP reciprocal compensation order that until the rulemaking is completed, the state commissions are the ones to determine how reciprocal compensation for ISP traffic should be dealt with. <sup>11/</sup> The Commission correctly concluded in that order that it should make decisions about the treatment of reciprocal compensation on the basis of a fully developed rulemaking record, on a prospective basis. The Commission must not allow GTE to short-circuit that process by denying CLECs the ability to opt in to GTE interconnection agreements in the meantime.

**III. GRANTING GTE'S PETITION COULD HARM THE ABILITY TO CLECS TO OPT INTO ANY INTERCONNECTION AGREEMENT.**

Grant of GTE's petition could have ramifications far beyond the ISP reciprocal compensation context. Grant of the petition could create precedent for ILECs to deny CLECs the ability to opt into interconnection agreements solely because an ILEC determines that a particular interconnection agreement element rate is no longer cost-based.

Granting GTE's petition also would subvert the statutory scheme of the 1996 Act, which calls for state commission arbitration of interconnection agreements; reliance by CLECs upon those agreements; and preservation of the ability of other CLECs to opt into those agreements. The Supreme Court's recent opinion upholding the FCC's pick-and-choose rule underscores the importance to

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<sup>11/</sup> ISP Reciprocal Compensation Order at ¶¶ 24, 25.

local competition of this right. <sup>12/</sup> The opting-in right also safeguards the nondiscrimination goals of the Act and speeds the development of local competition.

In sum, GTE's real goals in filing this petition appear to be (1) to avoid its obligations to make interconnection agreements available to all CLECs; (2) to avoid its obligations to pay reciprocal compensation for ISP-bound traffic under valid state arbitration orders, and (3) to short-circuit this Commission's further notice of proposed rulemaking in the ISP Reciprocal Compensation Proceeding. Its petition should be denied immediately.

## CONCLUSION

GTE has based its petition for declaratory ruling on a plainly incorrect reading of the Commission's rules. GTE should not be allowed to deny CLECs the ability to opt into interconnection agreements based on GTE's dissatisfaction with the outcome of state arbitration proceedings.

GTE's petition is a transparent attempt to short-circuit both the state arbitration process and the Commission's process for examining the basis for reciprocal compensation for ISP traffic in the future. The Commission should not

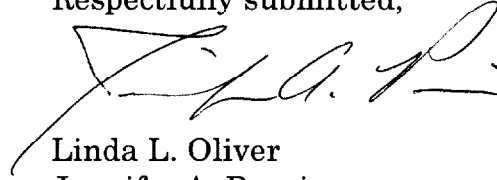
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<sup>12/</sup> AT&T Corp. v. Iowa Utilities Board, \_\_\_ U.S. \_\_\_, 119 S.Ct. 721, 738 (1999) ("AT&T Corp."), upholding 47 C.F.R. § 51.809.

waste valuable resources on this meritless and blatantly anticompetitive petition.

The petition should be denied immediately.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L. L. Oliver", with a long horizontal flourish extending to the left.

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